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Puspakom Sdn Bhd v Strateq Data Centre Sdn Bhd

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCVC-870–05 OF 2018
DARRYL GOON JC
2 AUGUST 2018

C

Tort — Detinue — Claim for — Recovery of equipment in possession and custody of third party — Whether third party owned equipment — Whether ownership of equipment proven — Whether claim ought to be allowed

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By a letter of award, the plaintiff appointed on Synergycentric Sdn Bhd ('Synergycentric') to perform services including the provision of wide area network and internet data centre management services for the plaintiff. Among the scope of services to be provided was the provision of space in the form of racks for the plaintiff to install, operate access and maintain its server and network equipment. Synergycentric had placed all the equipment owned by the plaintiff at the defendant's premises. Under a service agreement with the defendant, Synergycentric had the use of the services and facilities of the defendant to store computer systems. This was at a space provided by the defendant at the defendant's premises. Under the service agreement, Synergycentric was to pay the defendant RM163,800 every month. However, Synergycentric defaulted in making these payments and it owed the defendant a sum of RM2m. Synergycentric later informed the plaintiff that it was prevented by the defendant from gaining access to the plaintiff's equipment and had only remote access. This caused the plaintiff to encounter problems servicing its customers. The plaintiff filed the present claim, on the grounds of tort of detinue, for the recovery of equipment which were in the possession and custody of the defendant. The defendant's defence relied on the service agreement and argued that the equipment sought by the plaintiff was not owned by the plaintiff but by Synergycentric.

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Held, allowing the claim:

(1) Judgment was entered for the plaintiff with damages to be assessed. The defendant did not claim that it had title to the equipment and the defendant's contention was merely that the equipment belonged to Synergycentric. Aside from the service agreement, no other evidence was led by the defendant to rebut the plaintiff's claim to ownership of the equipment. This was more than sufficient evidence to refute the defendant's contention that the equipment belonged to Synergycentric (see paras 10 & 17).

I

[Bahasa Malaysia summary

Melalui satu surat award, plaintif melantik Synergycentric Sdn Bhd ('Synergycentric') untuk melaksanakan perkhidmatan termasuk penyediaan rangkaian kawasan luas dan perkhidmatan pengurusan pusat data internet untuk plaintif. Antara skop perkhidmatan yang akan disediakan ialah penyediaan ruang dalam bentuk rak bagi plaintif untuk memasang, mengendalikan akses dan menyenggara server dan peralatan rangkaiannya. Synergycentric telah meletakkan semua peralatan yang dimiliki oleh plaintif di premis defendan. Bawah perjanjian perkhidmatan dengan defendan, Synergycentric boleh menggunakan perkhidmatan dan kemudahan defendan untuk menyimpan sistem komputer. Ini adalah di ruang yang disediakan oleh defendan di premis defendan. Bawah perjanjian perkhidmatan, Synergycentric membayar kepada defendan RM163,800 setiap bulan. Walau bagaimanapun, Synergycentric gagal membuat pembayaran ini dan ia berhutang dengan defendan sejumlah RM2 juta. Synergycentric kemudian memaklumkan plaintif bahawa ia telah dihalang oleh defendan daripada mendapat akses terhadap peralatan plaintif dan hanya mempunyai akses dari jauh. Ini menyebabkan plaintif menghadapi masalah memberi perkhidmatan kepada pelanggannya. Plaintif memfailkan tuntutan ini, berdasarkan tort detinu, mendapatkan semula peralatan yang berada dalam milikan dan jagaan defendan. Pembelaan defendan bergantung pada perjanjian perkidhmatan dan menghujahkan bahawa peralatan yang diminta oleh plaintif tidak dimiliki oleh plaintif tetapi oleh Synergycentric.

Diputuskan, membenarkan tuntutan:

(1) Penghakiman direkodkan berpihak pada plaintif dengan ganti rugi untuk ditaksir. Defendan tidak menyatakan mempunyai hak milik terhadap peralatan dan hujahan defendan hanyalah bahawa peralatan dimiliki oleh Synergycentric. Selain perjanjian perkhidmatan, tiada keterangan lain yang dikemukakan oleh defendan untuk menyangkal tuntutan plaintif terhadap milikan peralatan tersebut. Ini adalah keterangan yang lebih daripada cukup untuk menyangkal hujahan defendan bahawa peralatan milik Synergycentric (lihat perenggan 10 & 17).]

Notes

For cases on detinue in general, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 958–965.

Cases referred to

General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 2 All ER 314, CA (refd)

Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor [1982] 2 MLJ 165, FC (refd)

Legislation referred to

Torts (Interference With Goods) Act 1977 [UK]

SM Shanmugam (Shona Anne Thomas with him) (Lee Hishammuddin) for the plaintiff.

RK Sharma (Amrit Pal Singh and Phang Zheng Jack with him) (Amrit & Co) for the defendant.

Darryl Goon JC:

[1] The plaintiff's claim in this originating summons is for the recovery of equipment that are in the possession and custody of the defendant in premises owned by the defendant known as I-City Data Centre, at M-3-3, Block M, Level 3, No 6 Persiaran Multimedia, City Point, iCity Seksyen 7, 40000 Shah Alam, Selangor Darul Ehsan. An itemised list of the equipment sought to be recovered, with particulars thereof, is annexed as *Lampiran* A to the originating summons.

[2] Filed in respect of this originating summons are: (a) an affidavit in supported affirmed on 4 May 2018 by the plaintiff's chief executive officer one Mohammed Shukor bin Ismail ('encl 2'); (b) an affidavit in reply affirmed on 5 June 2018 by one of the defendant's directors, one Yeap Chong Boon (encl 5); (c) an affidavit in reply affirmed by the said Mohammed Shukor bin Ismail on 20 June 2018 (encl 6); and (d) an additional affidavit affirmed on 26 July 2018 by one Judith Pretha a/p John Victor, an advocate and solicitor from the firm of solicitors representing the defendant (encl 12).

HOW THE EQUIPMENT CAME TO BE IN THE DEFENDANT'S PREMISES

[3] In encl 2, Mohammed Shukor bin Ismail explained that by a letter entitled a letter of award dated 26 November 2014, the plaintiff appointed one Synergycentric Sdn Bhd to perform services including the provision of wide area network and internet data centre management services for the plaintiff. Among the scope of services to be provided is the provision of space in the form of racks for the plaintiff to install, operate, access and maintain its serves and network equipment. In performing these services Synergycentric Sdn Bhd had placed all the equipment owned by the plaintiff at the data centre located within the defendant's premises.

[4] Under a service agreement with the defendant dated 30 May 2012, Synergycentric Sdn Bhd had, inter alia, the use of the services and facilities of the defendant to store computer systems. This was at a space provided by the defendant known as the 'Private Data Centre Space' at the defendant's

premises. This then was where Synergycentric Sdn Bhd performed its services for the plaintiff under the letter of award and where the equipment in question were stored.

[5] Under this service agreement, Synergycentric Sdn Bhd was to pay the defendant a monthly sum of RM163,800 which is termed as a 'Monthly Subscription Fee'. This sum is payable in advance once every three months. Synergycentric Sdn Bhd defaulted in making these payments and it owed the defendant a sum in excess of RM2m. Consequently the defendant sued and on the 29 December 2017, the defendant secured a summary judgment against Synergycentric Sdn Bhd for an amount of RM2,486,616.86. Synergycentric Sdn Bhd appealed the decision granting summary judgment. However, its appeal was dismissed by the Court of Appeal. In fact prior to the summary judgment the defendant had, on 16 June 2017, secured an order of seizure in the High Court against Synergycentric Sdn Bhd in the following terms:

> PERINTAH
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> (Lampiran 5)
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> *ATAS PERMOHONAN* Plaintif yang dinamakan di atas *DAN* setelah membaca Notis Permohonan bertarikh 13 Jun 2017 berserta dengan Afidavit Sokongan Yeop Chong Boon yang diikrarkan pada 9 Jun 2017 yang difailkan disini *DAN SETELAH MENDENGAR* Encik R.K Sharma dan Encik Amrit Pal Singh peguamcara bagi pihak Plaintif.
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> *MAKA ADALAH DIPERINTAHKAN* bahawa perintah-perintah seperti dibawah dibenarkan:-
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> (a) Bahawa segala peralatan-peralatan di premis perniagaan Defendan yang beralamat di M-3-3, Block M, Level 3, No 6 Persiaran Multimedia, ICity Section 7, 40000 Shah Alam, Selangor Darul Ehsan disita sebelum Penghakiman untuk jumlah terhutang sebanyak RM2,370,819.00 dan jumlah faedah sebanyak RM346, 668.92;
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> (b) Defendan tidak dibenarkan untuk mengeluarkan apa-apa peralatan di premis perniagaan Defendan yang beralamat di M-3-3, Block M, Level 3, No. 6 Persiaran Multimedia, ICity Section 7, 40000 Shah Alam, Selangor Darul Ehsan sehingga pelupusan penuh dan muktamad permohonan; dan
>
> (c) Kos permohonan dan kos yang berkenaan dengan proses penyitaan ini dibayar oleh Defendan.
>
> Bertarikh pada 16 Jun 2017.

Synergycentric Sdn Bhd's appeal against this order of 16 June 2017 also failed.

THE CLAIM AND THE DEFENCE

[6] Sometime in May 2017, Synergycentric Sdn Bhd had informed the plaintiff that it was prevented by the defendant from gaining access to the plaintiff's equipment to carry out its maintenance service. As a result, the plaintiff had no actual access to its equipment and had only remote access. Following this the plaintiff had encountered a variety of problems servicing its customers. In addition, its equipment contained sensitive information. The plaintiff was therefore understandably concerned. Having, by itself, failed to regain possession of its equipment, the plaintiff, through its solicitors, issued a demand dated 19 March 2018 on the defendant's solicitors to secure repossession of its equipment from the defendant's premises. Despite this, the plaintiff was not able to recover possession of its equipment. Consequently, the plaintiff issued this originating summons, premised on the tort of detinue.

[7] The main thrust of the defendant's defence is that the equipment sought by the plaintiff is not owned by the plaintiff but by Synergycentric Sdn Bhd. The basis for this contention is premised primarily on the fact that in the service agreement between the defendant and Synergycentric Sdn Bhd, the third paragraph in its recital states as follows:

> WHEREAS CUSTOMER (Synergycentric Sdn Bhd) is the owner of the Equipment Configuration which shall be located at SDC's centre and undertakes to pay for all the services and facilities provided by SDC under this Agreement.

[8] To this contention, the plaintiff responded by pointing to the fact that this service agreement between the plaintiff and Synergycentric Sdn Bhd of 30 May 2012, was entered into well before the plaintiff's contract with Synergycentric Sdn Bhd under the letter of award of 26 November 2014. Thus, the equipment referred to in the service agreement could not have been the same as those under the letter of award. In addition, it was also pointed out that the term 'Equipment Configuration' in paragraph three of the recital to the service agreement had a specific definition which referred to an attachment ie Schedule A. If Schedule A is examined, it will be noted that there is no equipment described or listed therein. Hence, the equipment referred to in the recital as the 'Equipment Configuration' is not identifiable and its existence then, was not even established. Furthermore, the plaintiff points out that in evidence in encl 2 is a letter from Synergycentric Sdn Bhd to the plaintiff dated 5 April 2018 confirming that the equipment (referred to as assets) set out in the plaintiff's letter of 4 April 2018, belongs to the plaintiff. This list of equipment set out in the plaintiff's letter of 4 April 2018 contains the same items of equipment that are listed in *Lampiran* A to this originating summons. Therefore, the defendant's case that the equipment in question do not belong to the plaintiff, but are owned by Synergycentric Sdn Bhd, is simply untenable.

[9] Counsel for the defendant then urged the court to infer that there is collusion between the plaintiff and Synergycentric Sdn Bhd to defeat the defendant's contention. The defendant posed the question why would the plaintiff write to Synergycentric Sdn Bhd to ask for confirmation of what was already known by them to be the plaintiff's equipment. This, however, does not seem odd having regard to the circumstance of this case. The plaintiff had been trying to secure possession of their equipment since August 2017. By its letter dated 28 August 2017, the plaintiff wrote to the defendant's solicitors seeking repossession of their equipment. There is then the plaintiff's solicitors' letter demanding access and removal of the plaintiff's equipment dated 19 March 2018. Thus, more than six months had passed and the plaintiff still could not recover their equipment from the defendant. The defendant's solicitor's response then, as now, was its obdurate insistence that the equipment belonged to Synergycentric Sdn Bhd, referring to the recital in the service agreement. It is therefore plainly logical and reasonable to expect the plaintiff to have written confirmation from Synergycentric Sdn Bhd that the equipment in question in fact belongs to the plaintiff. It was, after all, Synergycentric Sdn Bhd that placed the plaintiff's equipment in the defendant's premises under its service agreement with the defendant. It was thus plainly logical for Synergycentric Sdn Bhd to make it clear that the equipment it placed in the defendant's premises belonged to the plaintiff. The plaintiff's letter to Synergycentric Sdn Bhd requesting this confirmation was dated 4 April 2018 and this originating summons was issued the following month.

[10] The defendant further contended that the plaintiff had not proven its ownership to the equipment in question. The defendant also pointed out that several items in the list of equipment that was attached to the plaintiff's solicitors' letter of 19 March 2018 are not in *Lampiran* A. However, the defendant itself did not claim that it had title to the equipment. The defendant's contention was merely that the equipment belonged to Synergycentric Sdn Bhd, which contention, for the reasons given above, is simply not tenable. What then remained are the plaintiff's assertion on affidavit that it owns the equipment and the confirmation by Synergycentric Sdn Bhd that the plaintiff owns the equipment. No other evidence was led by the defendant to rebut the plaintiff's claim to ownership of the equipment save for the reference to the recital in the service agreement. To my mind, there is more than sufficient evidence in the circumstances of this case to refute the defendant's contention that the equipment belongs to Synergycentric Sdn Bhd, which is fundamentally its justification for refusing to release the equipment.

[11] The defendant also contended that this case was not to be heard by way of an originating summons and should have been brought by way of a writ action. If there were disputes of fact that called for oral testimonies, this

originating summons ought to be converted into a writ action. However, given the very basis of the defendant's contention that ownership of the equipment belonged to Synergycentric Sdn Bhd, ie merely by reference to the recital in the service agreement, there was in the ultimate no requirement for a full trial by way of a writ action. As for the several items in the list attached to the plaintiff's solicitors' letter of 19 March 2018 that were not in *Lampiran* A, suffice to say, by reason of their absence from *Lampiran* A, they are not items claimed in this originating summons. The defendant urged a more sinister motive or at least, a contradiction in the ownership claimed by the plaintiff. Learned counsel for the plaintiff acknowledged the discrepancy. There were some six or seven items in the list attached to the plaintiff's solicitors' letter of demand that were not in *Lampiran* A. However, the complete response to this contention is that these items not found in *Lampiran* A are not claimed by the plaintiff. Furthermore, I do not think this discrepancy per se, warrants or can give rise to any inference that the equipment do not belong to the plaintiff.

[12] The defendant also contended that the order of the High Court of 16 June 2017 somehow meant that the equipment seized was owned by Synergycentric Sdn Bhd. However, it is plain from the order of the High Court that it does not so declare. Indeed, even chattels attached by way of execution admit of a procedure for their true owners to claim them.

THE PLAINTIFF'S CLAIM FOR DAMAGES

[13] As stated above, the plaintiff's cause of action is in the tort of detinue. Learned counsel for the defendant suggested that the tort no longer exists. However, that is not the case. No authority or basis for this contention was provided. In England and Wales, the tort of detinue may have been abolished in 1978 by the Torts (Interference With Goods) Act 1977, but it has not been abolished in our country. The common law tort of detinue still survives as a cause of action in Malaysia.

[14] In *Perbadanan Kemajuan Negeri Selangor v Teo Kai Huat Building Contractor* [1982] 2 MLJ 165, Abdul Hamid FJ in delivering the judgment of the Federal Court stated at p 168 that:

> Close examination of *Rosenthal v Alderton & Sons Ltd* reveals that apart from the value of the goods to be assessed at the date of the judgment, a plaintiff may also recover damages in respect of the wrongful detention between the date of the refusal and the date of the actual return or the date of the payment of the value. In the judgment of the court read by Evershed J a p 378, it is stated that:
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> > The significance of the date of the refusal of the plaintiff's demand is that the defendant's failure to return the goods after that date becomes and continues to be, wrongful. Moreover, the plaintiff may recover damages in respect of the wrongful 'detention' after that date, eg ...

[15] In *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 2 All ER 314, Diplock LJ as he then was, pointed out at p 317, that:

> There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue. It is important to keep this distinction clear, for confusion sometimes arises from the historical derivation of the action of conversion from detinue sur bailment and detinue sur trover; of which one result is that the same facts may constitute both detinue and conversion. Demand for delivery up of the chattel was an essential requirement of an action in detinue and detinue lay only when at the time of the demand for delivery up of the chattel made by the person entitled to possession the defendant was either in actual possession of it or was estopped from denying that he was still in possession.

[16] His Lordship went on to further state that:

> On the other hand the action in detinue partakes of the nature of an action in rem in which the plaintiff seeks specific restitution of his chattel. At common law it resulted in a judgment for delivery up of the chattel or payment of its value as assessed, and for payment of damages for its detention.

CONCLUSION

[17] Having regard to the foregoing, judgment was entered for the plaintiff, with damages to be assessed. At the request of learned counsel for the defendant for a month within which to permit the plaintiff access to the defendant's premises to remove its equipment, the seven day period prayed for by the plaintiff was extended to 14 days. Cost of RM15,000 was awarded to the plaintiff, subject to 4% allocatur.

Claim allowed.

Reported by Afiq Mohamad Noor